STATE OF WISCONSIN
Department of Commerce

In the Matter of the PECFA Appeal of

James McGlenn
McGlenn Limited Partnership
4500 W Mitchell St
Milwaukee WI 53214-0000

PECFA Claim #53186-5142-10D
Hearing #97-193

Final Decision

P R E L I M I N A R Y R E C I T A L S

Pursuant to a petition for hearing filed December 9, 1997, under" 101.02(6)(e), Wis. Stats., and §ILHR 47.53, Wis. Adm. Code, to review a decision by the Wisconsin Department of Commerce (Department), a hearing was commenced on March 9, 1999, at Madison, Wisconsin. A proposed decision was issued on December 28, 1999, and the parties were provided a period of twenty (20) days to file objections.

The issue for determination is: Whether the Department's decision of February 12, 1997 in establishing the final reimbursement costs to the appellant was correct.

There appeared in this matter the following persons:

PARTIES IN INTEREST:
James McGlenn
McGlenn Limited Partnership
4500 W Mitchell St
Milwaukee WI 53214-0000

By: Ronald P. Brockman
Hand & Quinn
932 Lake Ave
Racine WI 53403-1519

Department of Commerce
PECFA Bureau
201 West Washington Avenue
PO Box 7838
Madison WI 53707-7838

By: Kristiane Randal
Department of Commerce
201 W. Washington Ave., Rm.321A
PO Box 7838
Madison WI 53707-7838

The authority to issue a final decision in this matter has been delegated to the undersigned by order of the Secretary dated February 9, 2000.

The matter now being ready for decision, I hereby issue the following

FINDINGS OF FACT

The Findings of Fact in the Proposed Decision dated December 28, 1099 are hereby adopted for purposes of this Final Decision with the following addition:

"9. Department approval of a methodology for reimbursement was not obtained by the appellant prior to the submittal of the claims addressed in this appeal."

CONCLUSIONS OF LAW

The Conclusions of Law, in the Proposed Decision dated December 28, 1999 are hereby adopted for - purposes of this Final Decision with the following deletions and additions:

Delete:

1. The words "remedial action" in Conclusion #2.
2. The word "inappropriately" and the statutory references " 101.143 (3)(d) and 144.76" in Conclusion #3.
3. Conclusion #4.

Add: Thee word "appropriately" and the statutory reference " 101.143 (3)" in Conclusion #3.

DISCUSSION

The Discussion in the Proposed Decision dated December 28, 1999 is hereby not adopted for purposes of this Final Decision.

It is the determination of the undersigned that the rules of the Department with regard to this matter are not ambiguous. ILHR/COMM 47.30 (4) (b) Wis. Adm. Code makes it clear that "Department approval of a methodology shall be obtained by the owner or operator prior to the submittal of any claims." The appellant as owner or operator did not so obtain Department approval prior to the Submittal of the claims addressed in this appeal the Department had the authority to determine the methodology used to establish the final reimbursement costs to the appellant in this matter.

FINAL DECISION

The Proposed Hearing Officer Decision dated December 28, 1999, is not adopted as the Final Decision of the department.

The Final Decision in this matter is that: The Department's decision of February 12, 1997 in establishing the final reimbursement costs to the appellant was correct.

NOTICE TO PARTIES

Request for Rehearing

This is a final agency decision under §227.48, Stats. If you believe this decision is based on a mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision and which you could not have discovered sooner through due diligence. To ask for a new hearing, send a written request to Department of Commerce, Office of Legal Counsel, 201 W. Washington Avenue, 6th Floor, PO Box 7970, Madison, WI 53707-7970.

Send a copy of your request for a new hearing to all the other parties named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the hearing examiner made and why it is important. Or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain how your request for a new hearing is based on either a mistake of fact or law or the discovery of new evidence which could not have been discovered through due diligence on your part, your request will have to be denied.

Your request for a new hearing must be received no later than 20 days after the mailing date of this decision as indicated below. Late requests cannot be granted. The process for asking for a new hearing is in Sec. 227.49 of the state statutes

Petition For Judicial Review

Petitions for judicial review must be filed no more than 30 days after the mailing date of this hearing decision as indicated below (or 30 days after a denial of rehearing, if you ask for one). The petition for judicial review must be served on the Secretary, Department of Commerce, Office of the Secretary, 201 W. Washington Avenue, 6th Floor, PO Box 7970, Madison, WI 53707-7970.

The petition for judicial review must also be served on the other "PARTIES IN INTEREST" and counsel named in this decision. The process for judicial review is described in Sec. 227,53 of the statutes.

Dated: 5/19/00

Martha Kerner
Executive Assistant
Department of Commerce
PO Box 7970
Madison WI 53707-7970

copies to:

James McGlenn
McGlenn Limited Partnership
4500 W Mitchell St
Milwaukee WI 53214-0000

Joyce Howe, Office Manager
Ul Madison Hearing Office
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Hand & Quinn
932 Lake Ave
Racine WI 53403-1519

Date Mailed: 06-01-00

Mailed By: Kris Behnke

STATE OF WISCONSIN
DEPARTMENT OF COMMERCE

IN THE MATTER OF: The claim for reimbursement under the PECFA Program by

MADISON HEARING OFFICE
1801 Aberg Ave., Suite A
P.O. Box 7975
Madison, WI 53707-7975
Telephone: (608) 242-4818
Fax: (608) 242-4813

James McGlenn
4500 West Mitchell Street
Milwaukee, WI 53214

Hearing Number: 97-193
Re: PECFA Claim # S3186-5142-10D

PROPOSED HEARING OFFICER DECISION

NOTICE OF RIGHTS

Attached are the Proposed Findings of Fact, Conclusions of Law, and order in the above-stated matter. Any party aggrieved by the proposed decision must file written objections to the findings of fact, conclusions of law and order within twenty (20) days from the date this Proposed Decision is mailed. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your objections and argument to: Madison Hearing Office, P.O. Box 7975, Madison, WI 53707-7975. After the objection period, the hearing record will be provided to Terry W. Grosenheider, Executive Assistant of the Department of Commerce, who is the individual designated to make the FINAL decision of the department in this matter.

STATE HEARING OFFICER:
James R. Sturm

DATED AND MAILED:
December 28, 1999

* *

MAILED TO:

Appellant Agent or Attorney

Ronald P. Brockman
Hand & Quinn
932 Lake Avenue
Racine, WI 53403-1519

Department of Commerce

Kristiane Randal
Assistant Legal Counsel
P.O. Box 7838
Madison, WI 53707-7838

STATE OF WISCONSIN
DEPARTMENT OF WORKFORCE DEVELOPMENT

IN THE MATTER OF:

Request for Reimbursement Pursuant
to the Provisions of the PECFA Program

Hearing Number: 97-193
PECFA Claim Number: 53186-5142-10D

James McGlenn
McGlenn Limited Partnership

Petitioner

vs

Wisconsin Department of Commerce,

Respondent.

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW

On February 12, 1997, the Department of Commerce (department) issued a decision allowing James McGlenn and McGlenn Limited Partnership (petitioner) reimbursement of $30,409.27, ($26,513.81 after deductibles), a portion of its total amended claim of $445,418.59. The petitioner appealed that decision and, pursuant to that appeal, a hearing was held on March 16, 1999, before Law Judge James R. Sturm, acting as a state hearing officer. Briefs were submitted by both parties in April and May of 1999.

Based on the applicable records and evidence in this case, the appeal tribunal makes the following

PROPOSED FINDINGS OF FACT

1. At all times material, James McGlenn, d/b/a McGlenn Limited Partnership, was the legal owner of the premises located at 600 E. Main Street, Waukesha, Wisconsin.

2. Petitioner contracted with Sigma Environmental Services, Inc., in 1991, to conduct the tests and make assessments and remedial efforts necessary for any petroleum contamination of the soil on that site, also known variously as the "General Castings" or "Roundhouse" plume.

3. Sigma submitted its report on the level of petroleum contamination in April of 1992, and remediation efforts were conducted under the supervision of Key Environmental Services, also under contract with petitioner.

4. It was determined that the most appropriate soil remediation method was the excavation and removal of soil from the site. That activity was arranged for and overseen by Key in 1994 and 1995. Of 2034 truckloads removed from the site during this time, 134 truckloads were sampled for contaminant levels.

5. Of the 134 truckloads sampled, 7 contained only PECFA eligible gasoline range organics (GRO) over 100 parts million (ppm). Another 53 truckloads contained GRO in excess of 100 ppm **and** PECFA noneligible diesel range organics (DRO) in excess of 100 ppm. The GRO in the remaining truckloads sampled did not exceed 100 ppm.

6. Both GRO and DRO contaminants required remediation regardless of reimbursement.

7. On December 8, 1995, the petitioner, through Key, submitted a request for reimbursement based on 60 of 130 contaminated samples having eligible products at or above the 100 ppm reimbursement level. It requested 50% of its costs in the amount of $441,764.14. This figure was later adjusted for arithmetic errors and duplication to $434,418.59.

8. On January 29, 1996, the Department of Industry, Labor and Human Relations (DILHR), the agency then responsible for these matters, disapproved of the allocation methodology submitted by petitioner and substituted a methodology that reimbursed the petitioner at a 7% rate in the dollar amount of $26,513.81 after deductibles.

RELEVANT STATUTES AND RULES

Section 101.143(3) Stats., provides, in relevant parts as follows:

(3) CLAIMS FOR PETROLEUM PRODUCT INVESTIGATION, REMEDIAL ACTION PLANNING AND REMEDIAL ACTION ACTIVITIES.

(c) Investigations, remedial action plans and remedial action activities. Before submitting an application under par. (f), except at provided under par. (g), an owner or operator or the person shall do all of the following:

1. Complete an investigation to determine the extent of environmental damage caused by a discharge from a petroleum product storage system or home oil tank system.
2. Prepare a remedial action plant that identifies specific remedial action activities proposed to be conducted under subd. 3.
3. Conduct all remedial action activities at the site of the discharge from petroleum product storage system or home oil tank system necessary to restore the environment to the extent practicable and minimized the harmful effects from the discharge as required under s. 292.11.
4. Receive written approval from the department of natural resources or, if the discharge is covered under s. 101.144(2)(b), from the Department of Commerce that the remedial action activities performed under subd. 3 meet the requirements of s. 292.11...

Application. A claimant shall submit a claim on a form provided by the department. The claim shall contain all of the following documentation of activities, plans, and expenditures associated with the eligible costs incurred because of a petroleum products discharge from petroleum product storage system:

1. .A record of investigation results and data interpretation.
2. A remedial action plan.
3. Contracts for eligible costs incurred because of the discharge and records of the contract negotiations.
4. Accounts, invoices, sales receipts or other records documenting actual eligible costs incurred because of the discharge.
5. The written approval of the department of natural resources or the department of commerce under par. (c)4.
6. Other records and statements that the department determines to be necessary to complete the application.

Section 101.143 (4) Stats., provides, in relevant parts as follows:

(b) Eligible costs. Eligible costs for an award under par. (a) include actual costs or, if the department establishes a schedule under par. (cm), usual and customary costs for the following items only:

6. Soil treatment and disposal.

12. Contractor costs for remedial action activities.

14. Other costs identified by the department as necessary for proper investigation, remedial action planning and remedial action activities to meet the requirements of s. 292.11.

Section ILHR 47.30(l)(c) and (d) of the Wisconsin Administrative Code provides as follows:

(1) ELIGIBLE COSTS. Eligible costs for an award issued under this chapter may be determined by the department based upon cost guidelines published by the department.

Section ILHR 47.30(4) of the Wisconsin Administrative Code provides as follows:

(4) CONTAMINATIONS CONTAINING ELIGIBLE AND INELIGIBLE PRODUCTS. When a contamination is identified which contains both eligible and ineligible products under the fund, only the costs associated with the eligible products may be claimed. Eligible costs of remediation, which are only associated with the eligible product, may be claimed in their entirety, as specified in this section. Any costs required because of the presence of an ineligible product may not be claimed even if a remedial benefit may be derived by the remediation of the eligible product.

Section ILHR 47.33(2)(c) of the Wisconsin Administrative Code provides as follows:

> (c) If a contamination is identified which contains both eligible and ineligible products, the owner or operator and the department shall be notified immediately. The consultant, in conjunction with the owner or operator, shall establish a methodology for dividing the costs of remediation between the eligible and ineligible products. The approach used to divide the costs of remediation shall be approved by the department prior to the submittal of the claim.

THE PETITIONER'S POSITION

The McGlenn Construction Company contends that it is eligible for reimbursement of 38.8% of its costs as allowed under the PECFA program for the remediation costs it incurred at its Main Street, Waukesha site. It contends that the department's failure to pay the appropriate amount was based on an inaccurate methodology, i.e., an arbitrary formula that grossly shortchanged the petitioner. Petitioner argues that the formula the department applied that ignored mixed contaminants was inappropriate and contrary to law. Instead, petitioner asserts that a fair and equitable reimbursement would be premised on a division of costs consistent with the percentage of eligible contaminants present in the sampled soil regardless of the presence of any other substances, eligible or not.

THE RESPONDENT'S POSITION

The department/respondent contends that it properly allocated certain costs submitted by McGlenn Construction in its remediation of the subject premises because of the presence of ineligible contaminants and that the petitioner has failed to sustain its burden of proof in establishing otherwise. It argues that the petitioner failed to show that the contamination of the contested soil samples were due to allowable contaminants alone and that petitioner had on obligation to satisfy its burden of proof by, essentially, a de novo demonstration of its eligibility. The petitioner, according to respondent, has not proved that any portion of the property was contaminated by products from an eligible storage system other than it reimbursed in accordance with its February, 1997 decision, which is the subject of this appeal.

Respondent argues that the agency rules ILHR 47.30(4) and 47.33(2)(c) are unambiguous in their application here as supporting the department's denial of the consideration of reimbursement of costs when ineligible contaminants were present. 47.30(4) states, in part, that: "Any costs required because of the presence of an ineligible product may not be claimed even if a remedial benefit may be derived by the remediation of the eligible product." Since the ineligible product exceeded 100 ppm, respondent reasons, clean-up was required regardless of the presence of eligible product. Section 47.33(2)(c) follows with the direction to the owner of the subject property and its consultant to "establish a methodology for dividing the costs of remediation between the eligible and ineligible products". And, of course, the methodology must be approved by the department. Respondent finds no ambiguity in these rules and argues the department strictly and properly applied the rules.

Respondent suggests that, given the percentage of contaminants present in the soil sampled, more than one division of costs could have been arrived at. It demonstrates that, since 38.8% of the samples showed contamination of both eligible and ineligible products exceeding 100 ppm, that percentage could then have been split 50-50 or, 19.4%. Adding the 5.2% that contained only eligible product, 24.6% of the total costs could have been reimbursed. However, petitioner failed to submit a

methodology based on that approach prior to the submittal of its claim and must, therefore, accept the department's allocation as substituted.

Respondent also takes issue with petitioner's assertion that the PECFA program reimbursement fund is remedial in nature and that the Administrative Code clearly and unequivocally requires that contaminated sites must be remediated regardless of whether the owner of the property is eligible for any claims against the fund. Respondent points out that petitioner has no right to any reimbursement despite its obligation to clean up its contaminated properties and the rules and statutes in that regard cannot be construed to create that right to remediation reimbursement.

DISCUSSION

The issue here is not one of the actual facts of the source and type of contamination, the form or appropriateness of remediation or the costs in performing the same. The only dispute is how the reimbursement amount was calculated, i.e., the methodology, given the mix of eligible and ineligible contaminants in the soil that was remediated. There is no burden of proof issue with respect to establishing the fundamental eligibility of the site at issue. There was no *de novo* hearing with respect to the methods and costs used in cleaning up a contaminated site. It was undisputed and assumed.

ILHR 47.30(4) of the Wisconsin Administrative Code is the pivotal Code section and upon which both parties' arguments are hinged. It states that

> only the costs associated with the eligible products may be claimed. Eligible costs of remediation, which are only associated with the eligible product, may be claimed in their entirety, as specified in this section. Any costs required because of the presence of an ineligible product may not be claimed even if a remedial benefit may be derived by the remediation of the eligible product.

The department essentially argues that otherwise eligible contaminated soil that is additionally contaminated by non-eligible contaminates loses its eligibility regardless of the obligation of a property owner to remediate its property. It is a case where the contaminate itself is contaminated. Petitioner, of course, argues the corollary; that the non-eligible contaminate remediation did little more than piggyback on the remediation efforts of the eligible contaminates.

It would appear that the rules cited here are ambiguous with regard to mixed contaminants and their respective reimbursement eligibility. And it is the facts of this case that illustrate that ambiguity. The petitioner performed its obligation to clean up a contaminated property. It did so, using methods that were approved. It submitted a methodology and request for reimbursement consistent with the applicable rules. The department did not accept that methodology and substituted its own. It was that decision by the department that was appealed. There is no other dispute but the application of the law with respect to what petitioner is entitled to be reimburse.

This is not a case of binding arbitration where both parties submit proposals and then are locked in. The department suggests that scenario when it argues that petitioner had its one shot at a methodology and its choice of 50-50 was unacceptable and now it is stuck with the department's counterproposal of 7% and, in this appeal, the "arbitrator" must choose one methodology or the other. However, it is the observation here that the department's suggestion in its brief of "what could have been" is fair, appropriate and not contrary to law. The respondent's formula took the 38.8% of soil samples that showed mixed, eligible, contamination, split that 50-50 to 19.4% and then added on the 5.2% of samples that showed only eligible contaminants. That result appears to be eminently fair and it is the decision here, then, that

the petitioner is entitled to reimbursement of its remediation costs as acknowledged by the department in the amount of 24.6% of those costs rather than the 7% rate previously allowed by the department.

PROPOSED CONCLUSIONS OF LAW

1. James McGlenn d/b/a McGlenn Construction Company is a property owner within the meaning of section of 101.143 of the Wisconsin Statutes.

2. The treatment of contaminated soil at 600 East Main Street, Waukesha, Wisconsin, was remedial action activity entitling, McGlenn to be reimbursed for costs approved for reimbursement under section 10 1. 143 (3) of the Wisconsin Statutes.

3 . The Department's action denying reimbursement in an amount greater than $26,513.81 was inappropriately determined under sections 101.143(3)(d) and 144-76 of the Wisconsin Statutes and ILHR 47.30.

4. Petitioner is eligible for reimbursement of 24.6% of its costs otherwise approved for reimbursement.

PROPOSED DECISION

The State Hearing Officer therefore finds that the decision of the Department of Commerce dated February 12, 1997, establishing the final reimbursable costs to the applicant, McGlenn Construction Company, was insufficient and is hereby modified to apply an allocation methodology of 24.6% of its actual costs in an amount subject to annually allowed maximum amounts under the law and the matter is remanded to the department for calculations consistent with this decision.

Dated this 28th day of December l999

By

James R. Sturm
Administrative Law Judge
Madison Hearing Office
1801 Aberg Avenue, Suite A
P.O. Box 7985
Madison, WI 53797-7985

NOTE: The administrative law judge notes petitioner's objection to the consideration of respondent's brief on the grounds it was not timely. That objection is overruled because of the failure of this judge to emphasize that time was of the essence in the submission of briefs as the lengthy delay in this proposed decision illustrates and for which he apologizes.

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